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08-1464

No. : _____

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SUPREME COURT, U.S.

In the

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC. and the SOUTH YAPHANK CIVIC ASSOCIATION, et al.,

Petitioners,

v.

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether property owners who unsuccessfully asserted state law claims in state court may assert a substantive due process violation under the United States Constitution for the first time in this Court, where they failed to raise, argue or preserve any federal or U.S. constitutional issue of any kind in the state courts below and where those state courts have not considered such issues in this litigation?

2. Whether a local zoning decision to approve the development of an industrial project on an industrially-zoned parcel of land can give rise to a violation of the substantive due process rights of owners of other property located in excess of one-half mile from the project site?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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STATEMENT OF THE CASE

This proceeding was commenced pursuant to New York State CPLR Art. 78. Petitioners sought to review two determinations of the Town Board of the Town of Brookhaven ("Town Board") which adopted a findings statement pursuant to the New York State Environmental Quality Review Act and granted the application of Caithness Long Island, LLC ("Caithness"), for a special permit, waiver and area variances regarding the construction of a 350-megawatt dual-fuel, combined combustion turbine electric power generator and a determination of the Town of Brookhaven Planning Board approving the site plan for the facility.

In this petition for a writ of certiorari petitioners argue for the first time that the community benefits package aspect of the application, which consists of payments in lieu of taxes to be paid to the Town, violates substantive due process. Petitioners did not raise a substantive due process claim in the state court proceedings. No state court passed on the issue, albeit all of the claims in the underlying petition were dismissed on the merits. The record is devoid of any reference to the issue in the lower courts. Petitioners are raising the substantive due process claim for the first time in the present petition and, as such, the petition should be denied.

In any event, petitioners cannot legitimately claim that they have a valid property interest in a benefit that was entitled to constitutional protection. Petitioners do not have a property interest in the power plant or the real property upon which it is

being built. Petitioners are not entitled to a particular SEQRA determination. Petitioners have not been deprived of property and their baseless accusations of improper payments do not support their vacuous claim. They do not even have standing to challenge the community benefits package, which was agreed to by the applicant, Caithness, and the Town Board. Under these circumstances, the petition should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

In June of 2004, respondent-respondent Caithness was selected by LIPA to establish a state-of-the-art electrical generating facility to provide critically needed electric energy for the residents of the Town of Brookhaven. Caithness proposed to construct this power plant on a 15-acre footprint within a 96 acre parcel in the Town of Brookhaven. This 96 acre parcel is located in an area which is zoned "Light Industrial-1". An electric generating facility is a permitted use within the L-1 zone. Brookhaven Town Code §85-309(B).

During 2004, the Town of Brookhaven and the Brookhaven Town Board began working with LIPA during the State Environmental Quality Review process. LIPA was the lead agency, but the Town was actively involved in the SEQRA process. During the SEQRA review process, public meetings were held regarding the draft scope of the work and the Draft Environmental Impact Statement ("DEIS"). Public comment was accepted throughout this process.

During the Summer of 2005, LIPA and the Town began negotiating a community benefits package which principally consisted of payments in lieu of taxes ("PILOTs"). The purpose of the PILOTs is to provide long-term certainty for local taxing authorities. The community benefits package, with a provision regarding the setting aside of 15% of PILOT payments for open space, was submitted to the Town Board before the public hearings.

Caithness applied for a special permit with associated variances in March, 2005. The first

public hearing was held on March 9, 2006. During the five hour hearing, representatives from Caithness and LIPA made presentations regarding the proposed construction of the plant. Board members made inquiries and comments on behalf of their constituents. While petitioners spoke out against the project, many members of the public spoke in favor of the project. Many municipalities, including the Village of Port Jefferson and the Suffolk County Legislature, supported the Caithness project.

On April 25, 2006 another public hearing regarding the Caithness application was held before the Town Board. Representatives from Caithness and LIPA gave additional presentations addressing inquiries from board members and comments from the public. Several of the petitioners herein again spoke, while others spoke in favor of the power plant. Thereafter, public comments continued to be made at board meetings and work sessions. Representatives of Caithness and LIPA appeared at the work sessions to further respond to inquiries.

On July 25, 2006, the Town Board, by a super majority vote of 5-2, voted to bring the SEQRA approval resolution to the floor for a vote. The Board, by a 5-2 vote, approved the Caithness SEQRA findings and thereafter approved the permit application[1]. After the Town Board voted in favor of the issuance of a special permit and issued its

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[1] Contrary to petitioners' hyperbole, the failure to adopt the resolution on June 6, 2006 was insignificant insofar as the matter was held in abeyance and remained under consideration by the Town Board.

Findings, Conclusions and Decisions, the planning board began the site plan review process.

The Brookhaven Town Planning Board reviewed the site plan application pursuant to Brookhaven Town Code § 85-45. The Board fully considered the elements set forth in Brookhaven Town Code § 85-45(E). On September 12, 2006, a public hearing was held. The petitioners appeared at the public hearing and spoke by their attorney. On September 25, 2006, the Planning Board issued its SEQRA findings statement and approved the site plan.

As noted by petitioners, the Supreme Court, Suffolk County granted the underlying New York State CPLR Art. 78 petition to the extent that the Town Board was required to explain its change of vote concerning required environmental findings. The other claims in the petition were rejected. Thereafter, the Town Board provided the required explanation and the petition was dismissed. Appeals were taken from the original order, the order dismissing the petition and from an order dismissing petitioner's proceeding contesting the approval of the site by the Town Planning Board. All of the appeals were resolved in favor of the Town Board, Caithness and the Long Island Power Authority[2]. Petitioners' application for leave to appeal to the New York State Court of Appeals was denied.

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[2] The appeal in East End Property Co. No. 1, LLC v. Kessel, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dep't 2007) involving the SEQRA determination was also resolved against petitioners.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The present petition does not raise a persuasive basis for review by this Court. Petitioner's false and misleading averments do not implicate this Court's discretionary powers of review. Critically, petitioners did not raise a Substantive Due Process claim in the state court proceedings. No state court in this case or in any related case has passed on the issues raised by petitioners, albeit all of petitioners' other claims have been soundly rejected. Petitioners have not complied with Rule 14 (g)(i) of this Court's rules and the petition should be denied on this ground alone. In any event, petitioners' omission weighs heavily against granting the petition and confirms that the belated claim has been fabricated solely for the purpose of obtaining review by this Court.

Moreover, petitioners have not identified a property interest worthy of constitutional protection and cannot state a substantive due process claim. Petitioners do not have a property interest in the power plant or the real property upon which it is being built. There is no benefit that petitioners can claim they are entitled to so as to substantiate their claim. Petitioners' mere subjective aversion to the facility does not suffice. Indeed, petitioners do not have standing to oppose the community benefits package agreed to by the Town and Caithness. The substantive due process claim raised for the first time in this petition is devoid of merit.

I. Petitioners Did Not Raise A Substantive Due Process Claim In The State Courts

Congress has given the Supreme Court the power to review final judgments or decrees rendered by the highest court of a State in which a decision could be had where any right is specially set up or claimed under the Constitution or the treaties or statutes of the United States. 28 U.S.C. § 1257(a). Under this statute and its predecessors, the Supreme Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented before the state court that rendered the decision the Supreme Court has been asked to review. Howell v. Mississippi, 544 U.S. 944, 125 S.Ct. 1655 (2005); Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028 (1997).

At bar, petitioners do not rely on any alleged exceptions to the foregoing rule, but erroneously claim that their substantive due process argument was raised by reference to its memorandum of law in support of the original petition. The memorandum of law does not contain a substantive due process argument. The general reference to the memorandum of law does not comply with this Court's Rule 14 (g)(i). Adams v. Robertson, supra at fn.3. Petitioners have not provided a specific reference to the place in the record where the matter appears. Petitioners have not quoted any decision or portion of the record where the argument was purportedly raised. They have not even quoted the memorandum where they allege the issue was presented. In fact, petitioners never raised a

substantive due process argument in any of the state court proceedings. Petitioners never raised a federal claim in any of the state court proceedings and the petition should be denied.

In Adams v. Robertson, supra, this Court explained that, "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented (citations omitted), and the aggrieved party bears the burden of defeating this assumption, ibid, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here." 520 U.S. at 86-87. In the present case, all of the state courts are silent on the issue urged by petitioners in this application. Petitioners have ignored their burden of demonstrating that the state court had a fair opportunity to address the federal question. A review of the state court determinations confirms that the issue was never raised.

At best, petitioners' prior claims regarding the New York Open Meetings Law which, in any event, were abandoned by petitioners, implicate procedural due process. The purported constitutional question now raised by petitioners was not pressed by them, or passed on, in the state courts. The absence of any substantive due process claim in the lower proceedings warrants summary rejection of the petition. Howell v. Mississippi, supra.

Petitioners' fabrication of a Federal claim for the first time in this petition exemplifies the purpose of this Court's practice. No state court has had an opportunity to address petitioners newly crafted substantive due process claim. The asserted validity

of the claim as it relates to the application of local codes and state statutes has not been considered. The veracity of petitioner's assertions regarding their federal claim has not been tested by any other court, albeit petitioners' state law claims have all been rejected.

In Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161 (1969), this Court set forth the rationale for refusing to consider claims that had not been raised in the lower courts: "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, citation omitted, they should be given the first opportunity to consider them." Cardinale v. Louisiana, 394 U.S. at 439. At bar, no state court was given the opportunity to consider petitioners' newly fabricated substantive due process claim and this Court should decline to entertain petitioners newly manufactured federal claim.

In McGoldrick v. Compagnie Generale Transatlantique, 309 U.S.430, 60 S.Ct. 670 (1940), this Court emphasized that, "[i]n the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are

erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned." McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. at 435.

The error urged by petitioners at bar, amounting to an alleged violation of substantive due process, was never a part of the lower court determination inasmuch as it was never raised in those courts. The state courts in this case have not passed on the purported violation of substantive due process and for this reason this Court should not entertain the new claim. See Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983). Accordingly, the petition should be denied.

II. Plaintiffs Do Not Have A Valid Property Interest Worthy Of Substantive Due Process Protection

To state a substantive due process claim for deprivation of property a party must first establish that he had a valid property interest in a benefit that was entitled to constitutional protection. Zahra v. Town of Southold, 48 F.3d 674 (2d Cir. 1995). Second a plaintiff must demonstrate that the defendant's action depriving plaintiff of that protected interest was so outrageously arbitrary as to be a gross abuse of governmental authority. Lisa's Party City Inc. v. Town of Henrietta, 185 F.2d

12 (2d Cir. 1999). Substantive due process protects individuals against governmental action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against governmental action that is incorrect or ill-advised. Catanzaro v. Weiden, 140 F.3d 91 (2d Cir. 1998).

To establish a property interest, a plaintiff must show a legitimate claim of entitlement. Crowley v. Courville, 76 F.3d 47 (2d Cir. 1996). In order for an interest in a particular land-use benefit to qualify as a property interest for purposes of the substantive due process clause a landowner must show a clear entitlement to that benefit. Clubside, Inc. v. Valentin, 468 F.3d 144 (2d Cir. 2006); O'Mara v. Town of Wappinger, 485 F.3d 693 (2d Cir. 2007). Where a regulator has discretion with regard to the benefit at issue there normally is no entitlement to that benefit. Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994).

Petitioners do not have a property interest in the power plant or the real property upon which it is being built. The project involves an application for a special use permit under New York State Law. It is well accepted that Federal courts should not sit as a zoning board of appeals to review zoning determinations of local authorities. O'Mara v. Town of Wappinger, supra; RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (2d Cir. 1989), cert. denied 493 U.S. 893, 110 S.Ct. 240 (1989). Petitioners do not have a protectable interest in denial of the permit. Cf. Clubside, Inc. v. Valentin, supra. In fact, as demonstrated below, the state courts all properly concluded that petitioners do not have standing to challenge the permit. This

Court should decline to review the entirely reasonable zoning determinations made by the Town Board. RRI Realty Corp. v. Incorporated Village of Southampton, supra.

It is fundamental that, unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special use permit gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right. Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead, 98 N.Y.2d 190, 746 N.Y.S.2d 662 (2002). The significance of this distinction is that the inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood. Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead, supra. Normally, a reviewing board is required to grant a special use permit unless there are reasonable grounds for denying the permit. Twin County Recycling Corp. v. Yevoli, 224 A.D.2d 628, 639 N.Y.S.2d 392 (2d Dep't 1996).

Moreover, petitioners' proximity to the plant site did not afford them standing to contest approval of the special use permit. The New York State Appellate Division, Second Department ruled that the New York State Supreme Court properly determined that the petitioners lacked standing to assert their claims challenging the Town Board's approval of the special permit, waiver, and area variances. The New York State Appellate Division, Second Department explained that petitioners may

not avail themselves of the presumption of injury in fact since they have not demonstrated that their properties lie in close proximity to the site and they have otherwise failed to demonstrate that they will suffer any injury which is in some way different from that of the public at large. Petitioners' mere subjective aversion to the facility does not suffice. Petitioners do not have an property interest that is entitled to constitutional protection and the belated substantive due process claim is vacuous.

Petitioners do not have standing to challenge the community benefits package which consists of payments in lieu of taxes to be paid to the Town. This structure avoids future tax grievances and provides a measure of certainty to both the Town and the applicant. Critically, the applicant does not object to the required payments in lieu of taxes. Caithness supports the community benefits package. Petitioners lack standing to oppose the payment structure. Indeed, petitioners are not adversely affected by the Community Benefits Package.

The fact that the Town Board, in its discretion, approved the Community Benefits Package in the best interests of the citizens of the Town, weighs against petitioners' substantive due process claim not in favor of the new claim. Petitioners' accusations of bribery and illegal payments are utterly baseless and, in any case, do not create a protectable property interest. The community benefits package was properly negotiated between the affected parties for the welfare of the citizens of the Town. Petitioners' unsubstantiated accusations of corruption do not

raise a constitutional question for review by this Court.

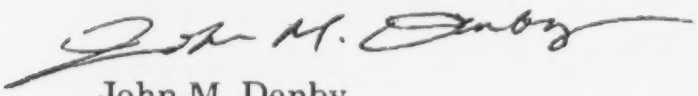
Petitioners' observation that they have a property interest in their own real property, petition at 20, is irrelevant. Petitioners have not been deprived of any property. The value of petitioners' property has not been diminished. Petitioners have not sustained any injury in fact. Petitioners' amorphous claim of entitlement based upon the Town Board's SEQRA resolution is unavailing. Petitioners were not entitled to any particular SEQRA determination. Accordingly, the substantive due process claim lacks merit and the petition should be denied.

The inclusion of the permitted use in the Town Code is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood. Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead, supra. In light of the detailed findings by the Town Board, based on extensive evidence, the state courts' determination upholding the FEIS and the legislative determination that the project is in harmony with the zoning plan and will not adversely affect the neighborhood, petitioners' assertion that they have or will suffer some vague deprivation is completely without substance. The substantive due process claim is thoroughly meritless and the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,



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